UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Richard H. Raymonda, Chapter 7

Debtor. Case No.: 99-13523

Paul A. Levine, Chapter 7 Trustee,

Plaintiff,

Adv. Pro. No.: 99-91199

v.

Richard H. Raymonda,

Defendant.

APPEARANCES:

Lemery, MacKrell, Griesler, LLC.
Attorney's for the Chapter 7 Trustee/Plaintiff
80 State Street
Albany, New York 12207

Paul A. Levine, Esq.
Of Counsel

Paul M. Fisher, Esq.
Attorney for the Debtor/Defendant
36 Park Street
Canton, New York 13617

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

The present issue was brought before the court by the Chapter 7 Trustee's ("Trustee") adversary proceeding objecting to Richard Raymonda's ("Debtor") discharge. The Trustee had initially objected to discharge pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4.) However, at trial he withdrew the § 727(a)(2) cause of action and elected to proceed exclusively on § 727(a)(4.)

Jurisdiction

This is a core proceeding within the court's jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(A), (J), and (O) and 1334(b).

Facts

The stipulated facts[1] are as follows:

1. The Debtor filed a Chapter 7 petition on June 10, 1999.

2. The Debtor's Schedule B (Personal Property Schedule) did not include any tools.

3. Paul Levine, Esq. was appointed the Chapter 7 Trustee.

4. The § 341 meeting was noticed and held in Watertown, N.Y. on July 14, 1999. The Debtor appeared at this meeting with counsel, Paul M. Fischer, Esq. The meeting was conducted by the Trustee.

5. Mary Renee Wilson, ex-wife of the Debtor also appeared at the meeting.

6. The first meeting was adjourned until August 11, 1999. Once again the Debtor appeared with counsel, the Trustee conducted the meeting, and the Debtor's ex-wife appeared at the meeting.

7. The Debtor was properly sworn and under oath and understood the significance of being under oath at each of the meetings of creditors.

8. At these meetings, the Debtor acknowledged that he had failed to list on his Schedule B various tools.

9. Debtor's counsel and the Trustee requested that the Debtor provide a detailed list of these tools.

10. The Debtor provided the list of tools to his counsel on August 18, 1999.

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[1]The facts are taken from the stipulation of the parties. No grammatical changes have been made but the court has tailored their presentation by combining some numerical paragraphs and redacting extraneous facts from others.

Based upon this list, an amended Schedule B was filed with the court on August 30, 1999.

11. The Debtor also obtained an appraisal of tools, which was provided to the Trustee under cover letter dated September 15, 1999.

12. The parties stipulated to the appraisal of Willis Shattuck without necessity for him to appear and provide testimony with respect to the appraisal report.

In addition, a copy of the list of tools and appraisal is attached as an addendum to this decision.

Argument

The Trustee argues that the Debtor's discharge should be denied pursuant to § 727(a)(4) based upon the Debtor's failure to disclose, on his petition and schedules, certain contractor's tools and equipment. The Trustee contends that the Debtor has not offered any credible explanation for these omissions and, therefore, a denial of discharge is warranted.

In contrast, the Debtor argues that the omission was simply an oversight, a mistake on his part. He argues that the Trustee has failed to prove that he had the necessary fraudulent intent when preparing the schedules and petition or when testifying at the creditors' meeting. Additionally, the Debtor contends that the omission of the tools and equipment was not material.[2] For the reasons that follow, the Trustee's request is granted and the Debtor's discharge is denied.

Discussion

11 U.S.C. § 727 governs a discharge and provides in part,

(a) The court shall grant the debtor a discharge, unless–

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[2]During his closing argument at trial, Debtor's counsel conceded that the omission was material. (Tr.61-61.) However, in his post-trial brief, he took the contrary position, arguing that the omission was not material. The court will, therefore, discuss materiality *infra.*

> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account ...

This difficult case involves two vital bankruptcy maxims. The first, debtors' inescapable duty to fully and accurately prepare their petition and schedules. 11 U.S.C. § 521; *In re Chalik*, 748 F.2d 616 (11th Cir. 1984.) They have or should have the necessary financial and other information that is required to be disclosed when requesting relief from the court. As such, they must accurately, meticulously and fully file the correct and complete information for an unqualified and speedy resolution of their case. As has been stated, "[t]he purpose of § 727(a)(4)(A) is to insure that adequate information is available to those interested in the administration of the bankruptcy estate without the need of examinations or investigations to determine whether the information provided is true." *Oldendorf v. Buckman*, 173 B.R. 99, 104 (E.D. La. 1994.) "A debtor has a paramount duty to consider all questions posed on a statement or schedule carefully and see that the question is answered completely in all respects." *In re Sofro*, 110 B.R. 989, 991 (Bankr. S.D. Fla. 1990) (citations omitted).

The other issue implicated is the Bankruptcy Code's purpose of giving deserving debtors a fresh start. To effectuate this purpose, objections to discharge are strictly construed against the objecting party. *In re Scarpinito*, 196 B.R. 257 (Bankr. E.D.N.Y. 1996); *In re Stevens*, 184 B.R. 584 (Bankr. W.D.Wash. 1995); *In re Spar,* 176 B.R. 321 (Bankr. S.D.N.Y. 1994); *In re Bodestein,* 168 B.R. 23 *(*Bankr. E.D.N.Y. 1994.)

A denial of discharge is an extremely drastic and harsh sanction; it is the death penalty of bankruptcy. Therefore, the party objecting to discharge, pursuant to § 727(a)(4), bears the burden

of establishing, by a preponderance of the evidence,[3] that:

A. the debtor made a statement under oath;

B. such statement was false;

C. the debtor knew the statement was false;

D. the debtor made the statement with fraudulent intent; and

E. the statement related materially to the bankruptcy. *In re* Scott, 233 B.R. 32 (Bankr. N.D.N.Y. 1998); In *re Kelly*, 135 B.R. 459 (Bankr. S.D.N.Y. 1992).

In the present case, the Debtor made a false statement under oath; he signed his petition under the penalty of perjury and omitted assets. The controversy concerns whether the Debtor knew the statement was false when he made it and, if so, whether he made it with the necessary fraudulent intent. Finally, as noted above, the Debtor also questions the materiality of the omission.

Did the Debtor Know the Statement was False?

It is undisputed that the Debtor made a false statement, therefore, the question becomes whether the Debtor knew the statement was false when he made it. In attempting to meet his burden, the Trustee established that the Debtor used the tools in question routinely (Tr.8), that tools were held in the garage, a place the Debtor accessed daily (Tr.14), and that the tools were subject to controversy during the Debtor's divorce proceeding (Tr.11.) Finally the Trustee established that the Debtor did not forget that he owned the tools at the time of filing. (Tr.14.) Indeed, the Debtor was asked on direct examination whether he had forgotten the tools when he filed his petition. The Debtor replied, "I wouldn't say I forgot. Nobody ever asked me. They

[3]Grogan v. Garner, 498 U.S. 279 (1991).

were never mentioned. If someone had asked me if I had tools I would have said yes." (Tr.14.)

This admission by the Debtor goes to the heart of the case and might be interpreted in one of two ways: either the tools were not in the forefront of the Debtor's mind when completing his schedules but if he had been reminded about them, he would have listed them **or** he knew about the tools, deliberately did not disclose them but would have, out of necessity, had someone directly asked. This court concludes that the latter is borne out by the Debtor's own testimony. During examination by his attorney, the Debtor was asked if anyone from the attorney's office asked him about tools. The Debtor replied, "It was either your paralegal on that day or on a telephone conversation she asked me if I owned any tools above the normal household, I said no." (Tr.20.) In this court's opinion any illusion of honesty is shattered by the suggestion that, as evidenced by Attachment A, welding equipment, air compressors, generators, nail guns, and scaffolding would be found in the garage of a normal household. Furthermore, the Debtor's attorney asked him if he knew about the tools; the Debtor answered in the affirmative. (Tr.20.) Based on these inconsistencies, the court finds that this Debtor knew the statement was false. "I wouldn't say I forgot," means just that, the Debtor knew about the tools and intentionally did not disclose them. The third prong of the test, that the Debtor knew that the statement was false, is thus satisfied.

Was the False Statement Made with the Requisite Fraudulent Intent?

It has been determined, "not all deliberately false statements are grounds for a denial of discharge. By the terms of Code § 727(a)(4)(A), the false oath and account must also have been made fraudulently." *In re Scott*, 233 B.R. at 44. Courts are well aware that a debtor will not admit to harboring a fraudulent intent. Therefore, the objecting party may prove this by

circumstantial objective evidence. *Id*. "Intent to defraud involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." *In re Chavin*, 150 F.3d 726, 727 (7th Cir. 1998) (citations omitted). Additionally, "A reckless disregard as to whether a representation is true will satisfy the intent requirement." *In re Keeney* 227 F.3d. 679, 686 (6th Cir. 2000) (citing, *In re Chavin* 150 F.3d at 728).

At the very least, this Debtor has shown a reckless disregard as to whether his representations were true and accurate. In addition to all the contradictions and inconsistencies, when he was questioned by the Trustee at the adjourned § 341 meeting, the Debtor was, as conceded by his attorney (Tr.65, 69), slow to disclose the existence of the tools. (Tr.22, 33 - 35.) The Debtor also admitted on redirect that if his former wife had not noted the existence of the tools, the Trustee would never have found out about them. (Tr.25.) When it reasonably appears that a false oath has been made, "... the burden falls upon the debtor to come forward with evidence that it was not an intentional misrepresentation. If the debtor fails to provide such evidence or a credible explanation for his failure to do so, a court may infer fraudulent intent. " *In re Murray*, 249 B.R. 223, 228 (E.D.N.Y. 2000) (citations omitted).

In an effort to rebut the inference of fraudulent intent, Debtor's counsel cites to *In re Kelly*, 135 B.R. 459 (Bankr. S.D.N.Y. 1992). In *Kelly*, the debtor failed to list, as an asset, motor vehicles that he owned. However, after the fact, he voluntarily came forward, recanted his earlier statement, and informed the Trustee about the cars. In dismissing the § 727(a)(4) complaint, Judge Brozman stated,

> Although his statements at the § 341 meeting were clearly false, his

> subsequent prompt and voluntary actions to set the record straight went a long way toward vitiating his impropriety. This is not a case where the trustee independently discovered the fraud and confronted the debtor who buckled under the weight of discovered truth, forced to acknowledge his guilt. Here, Kelly voluntarily retracted his false oath before it was discovered and without damage to the estate. *Id.* at 462-463.

This court agrees with Judge Brozman's decision, based upon Mr. Kelly's voluntary change of position. Apparently, he realized the error he made and voluntarily came forward to correct that situation. A court of equity could not and should not turn a blind eye to those facts. However, the *Kelly* case is obviously factually distinguishable from the present matter. Here, the Debtor did not reveal anything about the tools until he was confronted by his former spouse and the Trustee; he, in effect, "buckled under the weight of discovered truth..." *Id*. As stated by his attorney during summation at trial, getting this information from the debtor was "a little like pulling teeth." (Tr.65.)

Unlike the debtor in *Kelly*, this Debtor did not come forward to correct the situation. Rather than cooperating with the Trustee, so estate administration could progress smoothly, this Debtor forced the Trustee to act more like an investigator; the Trustee had to pry information from him instead of simply receiving his voluntary disclosure. The court has already noted that a debtor's failure to provide evidence that his false oath was not an intentional misrepresentation or to offer a credible explanation regarding his failure to disclose, allows a court to infer fraudulent intent. *In re Murray*, 249 B.R. at 228. This Debtor's failure to set the record straight, even after prompting by the Trustee, at the adjourned § 341 meeting, has provided additional evidence that has led to the inference that this Debtor harbored the requisite fraudulent intent.

Finally, the Debtor puts forth only a litany of confusion and incongruities and presents no

evidence that the misrepresentation was not intentional. Based upon all of the above, the court finds that the Debtor has demonstrated a reckless disregard as to whether the representations on his petition and schedules were true, thus satisfying the fourth prong of the test.

Did the False Statement Relate Materially to the Bankruptcy Proceeding?

Debtor's counsel, in his post Trial brief, argues that the omission of the tools was not material because the Trustee, "acknowledged at the close of Trial that he would not be administering these assets, as they would provide an inconsequential dividend to the unsecured creditors." (Debtor's Brief p. 12). Debtor's counsel cites to *In re Murray*, 238 B.R. 523 (Bankr. E.D.N.Y. 1999.), for the concept that "a practical sense of justice mandates that, in determining the dispositive issue in a § 727(a)(4) complaint, the court balance the debtor's intentional or reckless error or omission in his schedule against the actual harm to the estate." *Id.* at 528. However, shortly after the Debtor's brief was submitted, the *Murray* Bankruptcy Court was reversed by the United States District Court: *In re Murray*, 249 B.R. 223 (E.D.N.Y. 2000.) In doing so, the District Court stated,

> District courts and bankruptcy courts in the Second Circuit agree that materiality is defined as follows:
>
> > To prevail under Section 727(a)(4)(A) the objecting creditor must show that the false statement was made with respect to a material matter, that is one bearing a relationship to the debtor's business Transactions or estate or which would lead to the discovery of assets, business dealings or existence or disposition of property. *Id.* at 228.

In the present case, it is clear that the test for materiality is met; this Debtor's false oath related to the discovery of assets. Additionally, as acknowledged by the Debtor's attorney, "the integrity of the bankruptcy process relies on the judgment of Trustees, not debtors, as to what is and is not material." (Debtor's Brief p. 13). The final prong of the § 727(a)(4) test is thus met.

This court is intimately familiar with the concerns and responsibilities of Trustees and the fundamental premise that this system cannot function without the full, complete, and absolutely frank disclosure from debtors. The alternative would be chaos; trustees would have to approach each debtor and assume the worst, i.e. that the debtors have provided faulty or incomplete information. Debtors must never lose sight of the fact that, ordinarily, they come into this court voluntarily and request relief, ultimately leading to a discharge. The price for that discharge is timely, accurate and complete disclosure of all the information required by the Code.

Conclusion

Based upon the pleadings, the evidence adduced at trial, and for the above reasons, the Debtor's discharge is denied pursuant to 11 U.S.C. § 727(a)(4)(A).

It is so ORDERED.

Dated:
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge